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CHINESE-EXCLUSION LAW.



OPINION OF RALSTON & SIDDONS, ATTORNEYS: THAT THE DENOUNCEMENT OF THE TREATY OF 1894 WITH CHINA OPENS THE UNITED STATES TO UNRESTRICTED CHINESE IMMIGRATION.

APRIL 1, 1904.—Presented by Mr. Patterson and ordered to be printed.

MAY 5, 1902.

DEAR SIR: You have referred to us for consideration and opinion the following questions:

1. The recent act reenacting, extending, and continuing laws prohibiting and regulating Chinese immigration, "so far as the same are not inconsistent with treaty obligations until otherwise provided by law," suppose America or China shall give notice to the other Government six months before the expiration of the treaty of 1894 of its final termination, will not the further importation of Chinese be impliedly permissible under said treaty, which in terms only provides for exclusion of Chinese laborers for ten years, beginning with the date of the exchange of ratifications (December, 1894)?

2. The Chinese-exclusion act applying anti-Chinese immigration laws to the island territory under the jurisdiction of the United States and prohibiting immigration of Chinese laborers not citizens of the United States to the mainland, etc., will it be inconsistent with any treaty obligation of the United States, and in this respect in any degree unenforceable?

3. The said exclusion act provides—

that all laws now in force prohibiting and regulating the coming of Chinese persons and persons of Chinese descent into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the act entitled "An act to prohibit the coming of Chinese laborers into the United States," approved September 13, 1888, be and the same are hereby, reenacted, extended, and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law.

The question is whether the expression "not inconsistent with treaty obligations" applies to the laws and sections specifically above enumerated only or to this entire act?

4. What particular meaning is to be given the expression "until otherwise provided by law" contained in the first section of the proposed act?

5. Inasmuch as Chinese and persons of Chinese descent are, under the act just approved, only to be excluded from the United States when such exclusion shall be consistent with treaty obligations, supposing a Chinaman to be a British subject or the subject or citizen of

any other country other than China enjoying the most favored treaty relations with the United States, can he longer be excluded?

Before answering these questions specifically, we think it advisable to review briefly the treaty provisions which may be regarded as having some possible or actual relation to their subject-matter. The first treaty, therefore, to which we will refer is the treaty of July 28, 1868, commonly known as the Burlingame treaty. Sections 5 and 6 of this treaty, so far as it may be hereafter necessary to refer to them, read as follows:

ART. V. The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes. * * *

ART. VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

The next treaty, in order of time, was that of 1880. It will only be necessary for us to consider the first three articles of this treaty, which read as follows:

ARTICLE I. Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

ART. II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

ART. III. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.

The next treaty between the countries was that of December 8, 1894. We quote from this treaty the sections, or parts of sections, to which we may hereafter have occasion to allude:

ARTICLE I. The high contracting parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited.

ART. III. The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects being officials, teachers, students, merchant, or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. * * *

ART. IV. In pursuance of Article III of the immigration treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsu, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens or subjects. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States.

ART. VI. This convention shall remain in force for a period of ten years beginning with the date of the exchange of ratifications, and, if six months before the expiration of the said period of ten years, neither Government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years. * * *

The first section of the act which has just passed Congress and been signed by the President reads as follows:

That all laws now in force prohibiting and regulating the coming of Chinese persons, and persons of Chinese descent, into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the act entitled "An act to prohibit the coming of Chinese laborers into the United States," approved September thirteenth, eighteen hundred and eighty-eight, be, and the same are hereby, reenacted, extended, and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law; and said laws shall also apply to the island territory under the jurisdiction of the United States, and prohibit the immigration of Chinese laborers, not citizens of the United States, from such island territory to the mainland territory of the United States, whether in such island territory at the time of cession or not, and from one portion of the island territory of the United States to another portion of said island territory: *Provided, however,* That said laws shall not apply to the transit of Chinese laborers from one island to another island of the same group; and any islands within the jurisdiction of any State or the district of Alaska shall be considered a part of the mainland under this section.

The second section authorizes and empowers the Secretary of the Treasury to make rules and regulations under this act and all acts extended and continued, and also under the treaty of 1894, and to appoint agents.

The third section relates to importation of mechanics, etc., by foreign exhibitors at any fair or exposition authorized by Congress.

The fourth section reads as follows:

That it shall be the duty of every Chinese laborer, other than a citizen, rightfully in, and entitled to remain in any of the insular territory of the United States (Hawaii excepted) at the time of the passage of this act, to obtain within one year thereafter a certificate of residence in the insular territory wherein he resides, which certificate shall entitle him to residence therein, and upon failure to obtain such certificate as herein provided, he shall be deported from such insular territory; and the Philippine Commission is authorized and required to make all regulations and provisions necessary for the enforcement of this section in the Philippine Islands, including the form and substance of the certificate of residence so that the same shall clearly and sufficiently identify the holder thereof and enable officials to prevent fraud in the transfer of the same: *Provided, however,* That if said Philippine Commission shall find that it is impossible to complete the registration herein provided for within one year from the passage of this act, said Commission is hereby authorized and empowered to extend the time for such registration for a further period not exceeding one year.

HOW FAR CONSISTENT WITH TREATY OBLIGATIONS?

It will be noted that the first section of the law reenacts, extends, and continues existing laws prohibiting and regulating the coming of Chinese persons and persons of Chinese descent into the United States "so far as the same are not inconsistent with treaty obligations, until

otherwise provided by law." The question therefore arises when and to what extent the laws referred to are inconsistent with treaty obligations.

Our extracts from the various treaties will make it manifest that the Burlingame treaty permitted absolutely unrestricted immigration of Chinese into the United States, while the treaty of 1880 provided that the Government of the United States might "regulate, limit, or suspend" the coming or residence of Chinese laborers, "but may not absolutely prohibit it;" and further, that "the limitation or suspension shall be reasonable" and apply only to laborers, and that "legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration." The treaty of 1894 suspended, in our opinion, this provision far enough to prohibit the coming of Chinese laborers to the United States for a period of ten years expiring with December 7, 1904, provided six months' notice of intention to terminate the treaty should be given by one Government to the other; otherwise, it would remain in force for ten additional years. We are assured through the testimony of Hon. John W. Foster before the Committee on Immigration of the United States Senate that notice of intention to terminate will be given by China, and inasmuch as existing laws are only to be considered as valid when consistent with treaty obligations, it becomes important to us to determine whether from and after December 7, 1904, there will be any law prohibiting immigration of Chinese laborers into the United States. In our opinion, the immigration of Chinese laborers from and after the date given, China giving the required notice to terminate the treaty, will be absolutely legal. We think that the only possible restriction upon this immigration which could be considered as existing would be that to be found in the treaty of 1880, permitting regulation, limitation, or suspension of the entry of Chinese laborers. Existing acts do not purport to do any of these things but to prohibit, and, therefore, the power of prohibition expiring December 7, 1904—the only treaty which might be regarded as covering the subject denying the power of prohibition—any prohibitory law must be regarded as inconsistent with it and must fail. It is true that existing statutes are continued "until otherwise provided by law," but to our minds these words do not constitute such a limitation upon the prohibition of admission as to affect the question under discussion. They are placed in the act for the purpose of stating the period to which existing laws shall be continued, and inasmuch as they only state a period of continuance which is equally applicable to every other act of Congress, we do not think they change the character of the act as designed to be a prohibitory act.

TREATY OF 1880 IN FORCE.

We have so far referred to the treaty of 1880 as being in force, except so far as suspended temporarily by the treaty of 1894. We believe this view to be correct, unquestionably as to part, and as we think as to all of the treaty of 1880. It is unquestionably so as to part, because the treaty of 1894 expressly does not affect "the right at present enjoyed of Chinese subjects being officials, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein." The right so

enjoyed was enjoyed pursuant to the treaty of 1880 and acts passed in accordance therewith.

Again, in Article IV of the 1894 treaty it is said "in pursuance of Article III of " said (1880) treaty "it is hereby understood and agreed," etc. Later on in the same article it is said "and the Government of the United States reaffirms its obligation as stated in Article III," etc. With this distinct reference in the treaty of 1894 to the treaty of 1880 as an operative instrument we are not disposed to agree with the contentions of Hon. John W. Foster before the Senate committee above referred to, to the effect that on the expiration of the treaty of 1894 the Burlingame treaty will be the latest treaty in force. It is true, however, and we do not desire to ignore the argument, that the treaty of 1894, stating, as it does, a period for the absolute prohibition of the entry of Chinese laborers, might be regarded as replacing so much of the treaty of 1880 as covers this particular point, and, granting the validity of the argument, the position of Mr. Foster would be substantially correct, and we would be obliged to go back to the treaty of 1868 to determine our present relations with China upon this subject-matter.

ANSWER TO FIRST QUESTION.

The foregoing considerations answer your first question. Summing them up, however, we would say that the new act, being inconsistent after December 7, 1904, with the Burlingame treaty, and also inconsistent with the treaty of 1880 in that it purports to prohibit instead of suspend or limit the importation of Chinese laborers, must be, after said date, absolutely ineffective, and such laborers may then be imported without any legal interference.

Now, taking up your second question, as we have seen, the Burlingame treaty provides that—

Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may be there enjoyed by the citizens or subjects of the most favored nation.

Article III of the treaty of 1880, which, as we have stated, is recognized as in force by the treaty of 1894, refers to the protection of Chinese meeting ill-treatment, covering, therefore, a somewhat different subject-matter, and in our opinion leaving the Burlingame treaty in full force, further explanation being useful. One question which naturally arises is, what rights may citizens or subjects of the most favored nation enjoy as to travel or residence? This may be illustrated by the treaty of 1894 with Japan, which provides that "In whatever relates to rights of residence and travel, Japanese subjects shall have the same rights as native citizens or subjects;" while Article II of the treaty of 1859 with Paraguay permits citizens of that country "to remain and reside in any part of the United States." As by these treaties with the nations referred to, their citizens or subjects are given as full rights of residence and travel as citizens of the United States, and as Chinese enjoy equal privileges within the United States by the Burlingame treaty, then any attempt to prevent the coming of Chinese from the island territories of the United States to the mainland would be "inconsistent with treaty obligations," and must fail whenever its legality is limited by this clause.

It might be argued that this interpretation renders a part of the statute under consideration vain and nugatory, and therefore that it is

violative of one of the canons of statutory construction, but this would not be entirely correct, for the reason that our exclusion acts apply to "Chinese persons and persons of Chinese descent," so that the new law might prohibit the entry into the United States proper of persons of Chinese descent living in the Philippine Islands, while it would have no effect whatsoever upon Chinese persons, subjects of the Emperor of China.

The further suggestion might be made perhaps in opposition to this view that the Philippines were no part of the United States at the time of the signing of the treaty with China, or that they are not at the present time, in every constitutional view, part of the United States. To the first suggestion, the reply would be that the "United States," speaking in an international way, represents all of the territories over which the United States hold dominion, either at the time of the signing of the treaty or at any future time during which the treaty may remain operative. And to the second point the reply would be that foreign nations have no concern with the details of internal management or territorial subdivision of a nation, unless such difference be taken account of in some manner in the treaty itself, or possibly be recognized by the general consent and understanding of nations. Neither one of these conditions can be said to exist in the present case.

PHILIPPINE CLAUSE INEFFECTIVE.

It therefore follows that a full answer to your second question must be that the act just passed can not be successfully invoked to prevent the importation of Chinese from the island territory to the mainland of the United States, and there is, therefore, no law to prevent such importation.

Your third question is as to whether the expression "not inconsistent with treaty obligations" applies to the laws and sections specifically enumerated, or covers the entire act. To this, our answer is that in our opinion the expression applies to the entire act, or at least to all of Section I, the remaining sections not having any apparent relation to the question of treaty obligation.

Referring to your fourth question, we beg to say that we are not inclined to give any other meaning to the expression "until otherwise provided by law" than that it makes the statute perpetual, subject, of course, to treaty obligations, which, as we have shown, practically nullify it. It is to be borne in mind, however, that "until otherwise provided by law" may refer either to future statutory law or that law which may be embodied in treaty.

Referring to your last question, we beg to say that by treaty obligations entered into between the United States and other nations their citizens are allowed free access to this country. It must, therefore, follow that, assuming a person of Chinese birth or descent to be a citizen or subject of a nation with which we have such treaty obligations, he must be admitted to the United States under the new law as any other citizen or subject of the same country. This was not true under the old law, because that law operated against Chinese persons and persons of Chinese descent, irrespective of any question of citizenship or residence, and to this extent was subversive of treaty obligations with all nations whatsoever. Congress has now, however, seen fit to recognize treaty obligations with all countries as being in

full force, and there is therefore no possibility at the present time, in our judgment, of excluding from the shores of America any Chinese subject of Great Britain or any other "favored nation," except China. We are aware that it may be urged that "treaty obligations" have reference only to China; but in our opinion this contention can not be sustained. There is nowhere in the new act any reference whatsoever to treaties with any particular country, and the old laws excluding Chinese constitute infractions of treaty obligations, for the reason above indicated, with nations other than China, as well as with China itself. Furthermore, if Congress had intended the words "not inconsistent with treaty obligations" to refer exclusively to Chinese treaties, it would have been a very simple thing to add two words following "obligations," viz, "with China." As it is Congress has made the language as general as it could possibly be, and there therefore remains no law at all preventing those of Chinese birth or descent from coming to this country from lands other than those embraced within the Chinese Empire, they being citizens or subjects of such other land.

THE SUMMING UP.

We have aimed to answer fully the various questions submitted by you, and if we were to sum up the whole matter we would simply say that the new act, in so far as its vital provisions are concerned (China denouncing the treaty of 1894), simply operates to extend existing exclusion laws (except so far as they have heretofore applied to Chinese who are citizens or subjects of countries other than China) to December, 1894, and fails for any length of time whatever to keep Chinese subjects residing in the insular possessions out of the mainland of the United States.

Very respectfully, yours,

RALSTON & SIDDONS.

SAMUEL GOMPERS, Esq.,
Washington, D. C.

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